

W 2899

No. 14501

United States
Court of Appeals
for the Ninth Circuit

WESTERN PACIFIC RAILROAD CORPORA-
TION and ALEXIS I. DU PONT BAYARD,

See vol. 2899 Appellants.
vs.

WESTERN PACIFIC RAILROAD COMPANY,
Appellee.

Transcript of Record
In Two Volumes
Volume I
(Pages 1 to 52)

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

FILED

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	PAGE
Acknowledgment of Service.....	42
Bond on Appeal for Costs.....	46
Certificate of Clerk to Record on Appeal.....	48
Names and Addresses of Attorneys.....	1
Notice of Appeal.....	45
Order Adjudging the Western Pacific Railroad Corporation and Alex I. DuPont Bayard, Receiver, Guilty of Contempt.....	43
Order to The Western Pacific Railroad Corporation and Alexis I. DuPont Bayard, its Receiver, to Show Cause Why They Should Not Be Adjudged Guilty of Contempt.....	35
Petition of The Western Pacific Railroad Company for an Order to Show Cause.....	3
Exhibit A—Bill of Complaint.....	9
Petitioner's Points and Authorities in Support of Its Petition for an Order to Show Cause..	29
Exhibit No. 1—Order Adjudging The Western Pacific Railroad Corporation Guilty of Contempt of the Final Order of This Court	32

INDEX	PAGE
Respondents' Return to the Order to Show Cause Why They Should Not Be Adjudged Guilty of and Punished for Contempt of Court.....	37
Affidavit of William Marvel.....	39
Statements of Points on Which The Western Pacific Railroad Corporation and Alexis I. DuPont Bayard, Will Rely.....	50
Transcript of Proceedings.....	91

NAMES AND ADDRESSES OF ATTORNEYS

LEROY R. GOODRICH,

1203 Central Bank Bldg.,
Oakland, Calif.;

FRANK C. NICODEMUS, JR.,

30 Grand St.,
New York 4, N. Y.;

WILLIAM MARVEL,

Delaware Trust Bldg.,
Wilmington, Delaware,

Attorneys for Appellants.

McCUTCHEN, THOMAS, MATTHEW, GRIF-
FITHS & GREENE,

1500 Balfour Bldg.,
San Francisco,

For Appellee.

In the District Court of the United States, for the
Northern District of California, Southern Division

No. 26591-S

In the Matter of:

THE WESTERN PACIFIC RAILROAD COMPANY,

Debtor.

PETITION OF THE WESTERN PACIFIC
RAILROAD COMPANY FOR AN ORDER
TO SHOW CAUSE

The petition of The Western Pacific Railroad Company, a reorganized railroad company, formerly the debtor and in due course discharged in the above-entitled proceeding, for an order to show cause why The Western Pacific Railroad Corporation and Alexis I. du Pont Bayard, its Receiver, should not be adjudged guilty of contempt of the Final Order of this Court dated March 28, 1946, respectfully shows:

That the said The Western Pacific Railroad Corporation, a corporation created by and existing under the laws of the State of Delaware, is a party to the above-entitled reorganization proceeding.

That in said Final Order this Court expressly found and concluded, among other things, that:

“(a) All of the business, assets and property constituting the debtor’s estate of every kind and character, real, personal and mixed, and all of the right, title and interest therein of T. M. Schumacher

and Sidney M. Ehrman, as Trustees in Reorganization, vested in and became the absolute property of The Western Pacific Railroad Company on December 29, 1944, free and clear of all rights, claims, interests, liens and encumbrances of the former stockholders and creditors of the debtor company and all other persons, except as otherwise provided and directed in the order of this Court in this proceeding dated and entered November 27, 1944; and The Western Pacific Railroad Company is released and discharged forever from all of its debts and liabilities existing on or before December 28, 1944, whether or not the same have been presented and allowed in these proceedings, and said reorganized Company is free and clear of all such rights, claims, interests, liens, encumbrances, debts, obligations and liabilities, except as otherwise expressly provided in said order."

That in said Final Order this Court ordered, adjudged and decreed, among other things, that:

"6. All persons, firms, and corporations whatsoever, and wheresoever situated, located or domiciled, are hereby perpetually restrained and enjoined from instituting, prosecuting, or pursuing, or attempting to institute, prosecute or pursue, any suit or suits or proceedings in law or in equity, or otherwise, against The Western Pacific Railroad Company, or against the successors or assigns of said Company, or against any of the assets or property of said Company or its successors or assigns, directly or indirectly, on account of or based upon any right,

claims or interest of any kind or nature whatsoever which any such person, firm or corporation may have had in, to or against the Debtor, or any of its assets or properties, on or before December 28, 1944 (except as specifically provided for or permitted by prior order of this Court), and from interfering with, attaching, garnishing, levying upon, enforcing liens against or upon, or in any manner whatsoever disturbing any portion of the property, real, personal, or mixed, of any kind or character, now or hereafter belonging to or being in the possession of said Company, and from interfering with or taking steps to interfere with said Company, its officers and agents, or the operation of the lines of railroad or properties or the conduct of the business of said Company, by reason or on account of any obligation or obligations incurred by the Debtor or by the Trustees of the Debtor's estate on or before December 28, 1944 (except as specifically provided for or permitted by prior order of this Court), and all such persons, firms and corporations are also hereby restrained and enjoined from prosecuting against the Reorganization Committee, or any of them, their agents or attorneys, or against the Trustees of the Debtor's estate, or either of them, their agents or attorneys, or against the said Company, its agents or attorneys, any suit or proceeding arising out of, or based on, any act or acts done or omitted to be done in putting into effect and carrying out the plan of reorganization or any order of this Court entered in these proceedings.

“9. The Court hereby reserves jurisdiction to take such further proceedings as may be proper or necessary to enforce and make effective any direction or other provision contained in the order of this Court, filed November 27, 1944, in this proceeding, to enforce and make effective the terms and provisions of this final decree and, if necessary, to give instructions to the Western Pacific Railroad Company, upon application by said Company, with respect to carrying out the provisions of said order filed November 27, 1944, and of this order; to take such further proceedings as may be proper or necessary in connection with any appeal or appeals prosecuted from any order of this Court, in this proceeding; and to take such further proceedings as may be necessary or proper in connection with any expenses or liabilities within the provisions of the order of this Court filed October 23, 1944, or otherwise, which may hereafter be asserted against the Reorganization Committee, its agents or attorneys, in connection with carrying out and putting into effect the plan of reorganization.”

That a copy of said Final Order was duly served within 30 days of its date on the said The Western Pacific Railroad Corporation. That no appeal was taken from said Final Order, that the time for appeal therefrom has expired, and that the said Final Order has become final and is now in full force and effect.

That Alexis I. du Pont Bayard is the Receiver of Western Pacific Railroad Corporation, duly ap-

pointed by the Chancery Court of the State of Delaware, in and for the County of New Castle, on or about October 19, 1949.

That on the 22nd day of April, 1954, the said The Western Pacific Railroad Corporation and Alexis I. du Pont Bayard, Receiver, then and theretofore having knowledge of said Final Order heretofore referred to, commenced in the District Court of the United States, for the Northern District of California, Southern Division, a civil action numbered 33514 and entitled "Western Pacific Railroad Corporation and Alexis I. du Pont Bayard, Receiver, Plaintiffs, vs. Western Pacific Railroad Company, James Foundation of New York, Inc., and Western Realty Company, Defendants." That petitioner was served on the 26th day of April, 1954, with the summons and a copy of the bill of complaint filed in said action. That a copy of said bill of complaint, marked "Exhibit A," is attached hereto and is hereby incorporated herein.

That The Western Pacific Railroad Corporation and Alexis I. du Pont Bayard, Receiver, have asserted in said action a claim against petitioner upon an unsecured indebtedness of the pre-reorganization The Western Pacific Railroad Company to The Western Pacific Railroad Corporation existing prior to August 2, 1935, which claim in the Plan of Reorganization was found to be without value and which by the prior orders of this Court was released and discharged. That the commencement of said action is not and has not been provided for or per-

mitted by any order of this Court. That the said action of The Western Pacific Railroad Corporation and Alexis I. du Pont Bayard, Receiver, constitutes a violation of the Final Order of this Court dated March 28, 1946.

Wherefore, the petitioner asks that this Court issue forthwith its order to The Western Pacific Railroad Corporation and Alexis I. du Pont Bayard, Receiver, directing them to show cause why they should not be adjudged guilty of and punished for contempt of the said Final Order of this Court, and for such other and further relief, including its costs and damages, as may be proper in the premises.

/s/ ALLAN P. MATTHEW,

/s/ JAMES D. ADAMS,

/s/ BURNHAM ENERSEN,

/s/ ROBERT L. LIPMAN,

Attorneys for The Western Pacific Railroad Company.

McCUTCHEN, THOMAS, MATTHEW, GRIFFITHS & GREENE,

Of Counsel.

Duly verified.

EXHIBIT A

In the District Court of the United States for the
Northern District of California, Southern Division

Civil Action No. 33514

WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I. DU PONT BAYARD,
Receiver,

Plaintiffs,

vs.

WESTERN PACIFIC RAILROAD COMPANY,
JAMES FOUNDATION OF NEW YORK,
INC., and WESTERN REALTY COMPANY,
Defendants.

BILL OF COMPLAINT

To the Honorable, the Judges of the District Court
of the United States for the Northern District
of California, Southern Division:

The Bill of Complaint (hereinafter referred to
as the complaint) of Western Pacific Railroad Corporation and Alexis I. du Pont Bayard, Receiver, respectfully shows:

First: Western Pacific Railroad Corporation is a corporation duly organized and existing under the laws of the State of Delaware, and Alexis I. du Pont Bayard is Receiver of Western Pacific Railroad Corporation duly appointed by the Chancery Court of the State of Delaware in and for the County of New Castle (hereinafter referred to as the plaintiffs); and both of said plaintiffs are citizens and residents of the State of Delaware.

Second: The Western Pacific Railroad Company was the original petitioner in the reorganization proceedings under Section 77 of the Bankruptcy Act numbered 26591-S on the docket of this Court, the history of which, so far as material to this complaint and except as amplified herein, is judicially stated and found by the Honorable Louis E. Goodman, United States District Judge, in a certain action in this Court entitled, "Western Pacific Railroad Corporation, et al., vs. Western Pacific Railroad Company, et al., No. 26508—Civil," to be as follows:

"Plaintiff is The Western Pacific Railroad Corporation; its subsidiary was Western Pacific Railroad Company, an operating railroad company, herein referred to as the 'debtor'; defendant, the reorganized subsidiary is The Western Pacific Railroad Company.

"Statement of Facts

"Plaintiff corporation, a so-called holding company, from 1916 to April 30, 1944, owned all the outstanding capital stock of the debtor. For some years prior to 1935, the financial condition of the debtor had been steadily worsening. In 1935 it filed a petition under Section 77 of the Bankruptcy Act (11 USC 205) and this Court in that year placed its affairs in the hands of trustees. Thereafter a plan of reorganization was proposed and in 1939 it was approved by the Interstate Commerce Commission, 233 ICC 409. Inter alia, it was determined in the plan that the capital stock of the debtor owned by the plaintiff was without equity or value

and that plaintiff and its stockholders therefore were not entitled to participate in the plan. In 1940 this Court approved the plan of reorganization, including approval of the findings of the Interstate Commerce Commission as to the worthlessness of the plaintiff's equity. The Circuit Court of Appeals (now Court of Appeals) of the Ninth Circuit reversed in 1941 (124 F. 2d 136). In 1943 the Supreme Court reversed the Circuit Court and affirmed the order of the District Court (318 U. S. 448). It there considered and rejected the contention of the plaintiff that it should have the right to participate in the plan because of recent increased earnings of the debtor (318 U. S. 508, 509).¹ Thereafter, the plan of reorganization was, in accordance with the statutory provisions (11 USC 205e), submitted to the creditors, and, after their approval, the plan was confirmed on October 11, 1943, by this Court. The reorganization committee designated in the plan of reorganization, instead of forming a new corporation, determined to use the corporate structure or shell of the old company (debtor) and to execute the plan of reorganization by revesting its former properties in the reorganized company, i.e., the defendant. On November 22, 1943, an agreement was made between the plaintiff, its secured creditors and the reorganization committee wherein a modus of revesting was set up. Among other things, the plain-

¹See in re Denver & R. G. W. R. Co. 10 Cir. 150 Fed. 2d 28 and R. F. C. v. D. & R. G. R. Co. 328 U. S. 495, where similar holdings upon similar contentions were made.

tiff agreed therein to transfer all of its stock in the debtor to the reorganization committee. This agreement was approved by this Court, in December, 1943. The transfer of the stock was not actually made until April, 1944, because of an unsuccessful litigative² attempt to prevent the same. During the period of years in which the plaintiff was the owner of all the outstanding stock of the debtor, plaintiff had followed the practice of filing consolidated or affiliated income tax returns, in which it had reported the earnings of the debtor as well as other affiliated companies, which the plaintiff wholly or partly owned. The amount of taxes paid by the plaintiff pursuant to such returns was allocated among the various subsidiary companies having taxable income in proportion to the amount of such taxable income. The practice of filing the consolidated returns continued throughout the reorganization period. The returns, during the reorganization period, were prepared by the employees of the debtor and signed by the president of the plaintiff corporation, although they were never submitted to its board of directors for approval or consideration.

“During the year 1942, the debtor made substantial net earnings. Neither plaintiff, nor any of its other subsidiary companies, had any earnings during 1942. A consolidated return was filed for the year 1942 in which the tax liability, due to the earnings of the debtor, was \$4,144,828. Later in 1943, after the filing of the 1942 return and payment of

²Bryant v. Western Pac. R. Corp. 35 A. 2d 909 (Del. Ch. Feb. 10, 1944).

the tax, the tax attorneys for defendant 'discovered' Section 123 of the Revenue Act of 1942 (26 USC 23(g)4).³ They proposed what they denoted a 'paradoxical' theory, by which the worthlessness of the plaintiff's stock (which had cost the plaintiff some \$75,000,000) in the operating railroad company (debtor), might be availed of as an offset to the operating income of the debtor and thus result in a net loss and no tax obligation. Further, their theory was that part of this \$75,000,000 loss in 1943, could be 'carried back' to 1942 (sec. 122(b)(1) of the Internal Revenue Code) and part could be 'carried over' to 1944 (Sec. 122(b)(2) of the Internal Revenue Code).

"Thereupon a claim for refund of the amount of tax paid for 1942 was filed in the name of the plaintiff. Operations of the debtor during 1943 and up to April 30, 1944, were increasingly profitable and, except for the offset of the capital stock loss of the plaintiff itself, would have called for the payment of some \$17,000,000 in income taxes. So the tax attorneys caused the filing of consolidated tax returns for 1943 and for the forepart of 1944 in the name of plaintiff, in which sufficient portions of the \$75,000,000 stock loss were used as offsets against the operating accounts for these years, so as to show

³"Stock in affiliated corporation. For the purposes of paragraph (2) stock in a corporation affiliated with the taxpayer shall not be deemed a capital asset.' (Subsection 4 of Sec. 23g.) By this subsection, losses resulting from worthlessness of stock of an affiliated became operating losses instead of capital losses as theretofore.

no net income. The validity of the offsets was questioned by the Commissioner of Internal Revenue and conferences were had between the tax counsel for the defendant and the Commissioner. As a result, a tax settlement was made with the Commissioner whereby, in consideration of the withdrawal of the claim for refund, the Commissioner accepted and approved the returns. The nature and basis of this compromise settlement will be hereafter more fully discussed.

“Subsequent to the filing of the claim for refund of the 1942 tax paid, and the filing of the consolidated tax returns for 1943 and part of 1944, and after negotiations for the settlement of the entire tax issue with the Commissioner of Internal Revenue had started, the plaintiff, on October 10, 1946, filed its bill of complaint in equity herein. In substance the bill of complaint recited the filing of the claim for refund, the commencement of the negotiations for the approval of the consolidated returns and prayed that the Court settle the proprietary rights of the plaintiff and the defendant in the tax saving involved. It was further prayed that funds equivalent to the tax savings be placed in the custody of the court for proper and equitable distribution.⁴

“On April 7, 1947, the Court permitted the filing of a complaint in intervention on behalf of certain

⁴“The debtor had on two separate occasions set aside reserve funds for the payment of the taxes. to protect against the contingency of adverse ruling by Commission or Court.

stockholders of the plaintiff who wished to join in the demand of the plaintiff and in its prayer for relief against the defendant. The settlement and agreement with the Commissioner, by which the claim for refund was withdrawn and the consolidated returns for the years 1942, 1943 and part of 1944 were accepted and approved, was consummated on August 14, 1947.

“On December 17, 1947, plaintiff filed a supplemental bill of complaint, wherein the consummation of the settlement and compromise was set forth. It was there further alleged that the defendant through its officers and attorneys had controlled the board of directors of the plaintiff corporation and that by reason of such control plaintiff was caused to file the consolidated return for the benefit of the defendant. Throughout the proceedings and in the trial, this has been referred to as ‘duality of control.’

“In the supplementary complaint, the plaintiff prayed that the Court, in equity, enter a decree allocating and directing the payment of the abated taxes, amounting to some \$17,000,000, to the plaintiff by way of mitigation of its losses in its subsidiary.

“After many preliminary motions were made and disposed of, and after the filing of answers by the defendant and after pre-trial conferences, the cause finally came on for trial.

“The trial itself consumed 13 days; the proceedings are set forth in 1700 pages of transcript; 14 witnesses testified and 164 exhibits, with various subdivisions, were introduced in evidence.

“A number of special defenses were pleaded and testimony and exhibits offered at the trial in support thereof.

“But I am of the opinion, in view of the fact that the cause is concededly of equitable cognizance, that decision must depend upon the essential righteousness of plaintiff’s claim as an equitable demand.

“Discussion

“The income tax picture presented is bizarre indeed. It is ‘paradoxical,’ as the defendant’s tax attorneys put it.⁵ The Western Pacific Railroad Company, the operating company, profitably conducted its railroad facilities in reorganization during 1942, 1943 and the forepart of 1944. Its own profit and loss records showed the debtor to be accountable to the United States in the sum of \$21,-346,567 income taxes for the years 1942, 1943 and the first four months of 1944. During this same period of time the plaintiff was still the legal owner of all the capital stock of the debtor, an ownership which had been declared by both the Interstate Commerce Commission and the Reorganization

“⁵In a letter dated May 20, 1943 (plff. Ex. 50), addressed to Curry, Vice President of defendant company, tax counsel Polk set forth his idea of using the plaintiff’s stock loss in the debtor to offset debtor’s profits, saying: ‘This is commented upon rather than suggested, since it is paradoxical to compute a loss upon the operating company’s stock which, through the mechanics of consolidated return reporting, could be used to nullify the very income of the affiliate whose stock had become worthless.’ (Interlineation supplied.)

Court to be valueless. But the tax attorneys for the defendant conceived a 'paradoxical' plan. They decided that they would file, pursuant to Section 141 of the Internal Revenue Code and the Treasury Regulations issued thereunder⁶ affiliated or consolidated returns on behalf of the parent company and its subsidiaries and in them set up the plaintiff's stock loss (i.e., its ownership in the debtor) as an income tax deduction against the operating profits. Ostensibly they found their authority for so doing in Section 123 of the Revenue Act of 1942 (26 USC Sec. 23(g)4).⁷ Thus, part of the lost \$75,000,000 stockholding of the plaintiff in the debtor was applied as an offset to operating profits during each of the three years in question to the end that no part of the \$21,346,567 tax would be paid.

"This was more than mere tax 'saving'; it amounted to a complete tax 'escape.' But the debtor had already paid \$4,144,828 income taxes for the fiscal year 1942 and it had filed a claim for refund of such taxes upon the ground that it owed no taxes for 1942 if, on the theory of 'carry-back,' part of the \$75,000,000 stock loss was a proper deduction. So in order to make the far larger saving or 'escape' offered for the three years in question, the claim for refund was waived and the Commissioner then

⁶Sec. 141 Internal Rev. Code permits the filing of a consolidated return by affiliated corporations. Regulations 104 and 110 contain detailed requirements for such filing.

⁷See footnote # 3.

accepted the returns for 1942-1943 and the fore part of 1944. The effect of this was that the debtor paid \$4,144,828 taxes to the United States in order to escape the \$21,346,567 previously mentioned, or a net saving or 'escape' of \$17,201,739. To all of this the Commissioner agreed. It was stated to be a compromise because of some question as to the date of definite ascertainment of the stock loss. The Commissioner apparently agreed that, under the 1942 amendment (Sec. 23(g)4), it was proper to offset the capital stock loss against the net operating gain, and the taxpayer paid \$4,144,828 to resolve some alleged uncertainty as to the date of ascertainment of the stock loss.⁸

"How the amendment to the statute, Sec. 23(g)4), could have been availed of by the debtor is, mildly stated, puzzling, if not downright amazing. Its application in an orthodox case is understandable. The theory of deducting a loss in an economic aggregation of affiliated corporations, where one unit gains and the other unit loses, has been recognized and approved by Congress and the Courts.

"Prior to the Revenue Act of 1938, losses resulting from the worthlessness of stocks and bonds were deductible from ordinary income and were not subject to the so-called capital-loss limitations. These

⁸"It is not at all clear to the Court how the alleged uncertainty as to the date of ascertainment of the stock loss could have been a true factor affecting the tax settlement inasmuch as any such uncertainty would, if it existed, as well apply with respect to the 1943 and 1944 returns."

limitations, that is that a capital loss could only offset a capital gain, had applied only to sales and exchanges, with the result that it was more advantageous to allow stocks, that might become worthless, to become worthless rather than to sell them. By the 1938 Act losses sustained by reason of the worthlessness of securities were treated as if they resulted from the sale or exchange of capital assets and thus were subject to the limitations applying to deductions in the form of capital losses, 26 USC 23(g)4, which was Section 123 of the Revenue Act of 1942, accorded losses on worthless stocks held by a taxpayer in affiliated corporations the same treatment accorded losses from all worthless securities prior to the Revenue Act of 1938."

Third: As the result of the various steps outlined in the foregoing quoted part of the opinion of the District Court, which was formally adopted by the District Court as its Findings of Fact, a net fund amounting to \$17,201,739 is in the possession of the Western Pacific Railroad Company, having been transferred to it by Thomas M. Schumacher and Sidney Ehrman, Trustees, subject to an Assumption Agreement whereby it assumed:

"Generally any and all liabilities and obligations with respect to claims of any character whether heretofore or hereafter asserted arising out of the possession, use or operation of the debtor's property by the said Trustees, or their conduct of the debtor's business."

Fourth: The Plan of Reorganization of the debtor

referred to in the opinion quoted above was certified to the District Court by the Interstate Commerce Commission June 21, 1939, and was approved by the District Court August 15, 1940, at a time when a loss resulting from the worthlessness of securities owned by a holding corporation, in which category petitioner Western Pacific Railroad Corporation belongs, could be offset only against capital gains occurring in the same tax period, but on October 21, 1942, Congress inserted in the following provision of the Internal Revenue Code forming part of Section 23 the paragraph thereof numbered (g)(4):

“Deductions from gross income. In computing net income there shall be allowed as deductions:

“* * *

“(g)(2) Securities becoming worthless. If any securities (as defined in paragraph (3) of this subsection) become worthless during the taxable year and are capital assets, the loss resulting therefrom shall, for the purposes of this chapter, be considered as a loss from the sale or exchange on the last day of such taxable year of capital assets.

“* * *

“(4) Stock in affiliated corporations. For the purpose of paragraph (2) stock in a corporation affiliated with the taxpayer shall not be deemed a capital asset. For the purpose of this paragraph a corporation shall be deemed affiliated only if:

“(A) At least 95 per centum of each class of its stock is owned directly by the taxpayer; and * * *”

Fifth: The enactment of the foregoing Section 23(g)(2)(4) on October 21, 1942, authorizing restoration out of consolidated taxable income of the lost capital of the parent invested in the securities of a subsidiary could not have been reasonably anticipated or foreseen by the Interstate Commerce Commission on June 21, 1939, when it certified the Plan of Reorganization to this Court, and on October 10, 1946, the plaintiffs Western Pacific Railroad Corporation filed in this Court the suit hereinbefore referred to (in which suit at a subsequent stage Alexis I. du Pont Bayard was added as an additional plaintiff) against Western Pacific Railroad Company, the debtor in the Bankruptcy proceedings 26591-S and the obligor under the Assumption Agreement hereinbefore mentioned, and also against the additional parties named in the subjoined footnote as defendants,* praying an accounting by the reorganized Western Pacific Railroad Company in respect of the use under federal consolidated income and excess profits tax returns of the plaintiffs' tax credit in the amount necessary to effect a relinquishment of its taxable income up to \$17,201,739 under Section 23(g)(2) and (4) set out above. The subsequent history of this accounting proceeding and the antecedent history of Section 77 proceeding for the reorganization of the debtor

*The Sacramento Northern Railway, Tidewater Southern Railway, Deep Creek Railroad Company, The Western Realty Company, The Standard Realty and Development Company, and Delta Finance Company, Ltd.

Railroad Company are within the judicial knowledge of this Court, as revealed by the official reports in chronological order cited below.*

Sixth: Under the Internal Revenue Code and the Regulations of the Treasury of the United States thereunder, the plaintiff Western Pacific Railroad Corporation was free to join or refuse to join in consolidated returns as it saw fit, and was under no statutory duty to file consolidated returns and was free to make its own decision whether to file or not to file on the basis of its own interests.** But the Court of Appeals held (Judge Fee dissenting) in response to repeated assertions of the defendant Railroad Company that it had not paid its pre-reorganization debts and that the plaintiff Western Pacific Railroad Corporation was under an equit-

*Western Pacific Railroad Company Reorganization, 230 I.C.C. 61; 233 I.C.C. 409; in re Western Pacific Railroad Company, No. 26591-S, 34 F. Supp. 493; Western Pacific Railroad Company vs. Reconstruction Finance Corporation, et al., and four other cases, No. 9712, 124 Fed. 2d 136 (1941); Ecker and others vs. Western Pacific Railroad Corporation, et al., 318 U. S. 418 (1943); Western Pacific Railroad Corporation vs. Western Pacific Railway Company, et al., No. 26508, 85 F. Supp. 869 (1949); Western Pacific Railroad Corporation, et al., v. Western Pacific Railroad Company, et al., 197 Fed. 2d 994 (1951); Western Pacific Railroad Corporation, et al., v. Western Pacific Railroad Company, et al., 345 U. S. 247 (1953); and after remand 205 Fed. 2d 374, 206 Fed. 2d 495.

**Treasury Regulation 109, Sec. 23—16a and 11a—Duke Power Company v. Commission, 44 Fed. 2d 543, 545 (4 Circuit).

able duty as fiduciary to join in consolidated returns and thereby donate its tax credit and the avails thereof to the reorganized defendant Railroad Company because its creditors had not been fully paid. The following is from the prevailing opinion written by Judge Byrne:

“The Corporation was the sole owner of the subsidiary’s (the debtor’s) capital stock. As such it was under a duty to deal fairly with the subsidiary, having full regard for the interests of the creditors and holders of other securities. Consolidated Rock Products Co. v. Du Bois (312 U. S. 510). It owed a duty not to require the subsidiary to forego a legitimate tax saving and could not bargain to perform its duty. * * * If Corporation had required tribute as a condition of its co-operation then it would have been acting with less than the required standard of fairness to the subsidiary’s creditors.”

The plaintiffs are bound by and accept this determination of the Court of Appeals, and their purpose and objective in filing this successoral complaint is to provide the essential machinery or medium for implementing it and requiring the reorganized Western Pacific Railroad Company, as in duty bound under its Assumption Agreement as the trustee-custodian of the fund also to accept it and to carry it into effect.

Seventh: The doctrine of Consolidated Rock Products Company vs. Du Bois (312 U. S. 510) is that junior interests in a bankruptcy or equity administration proceeding cannot be given any part

or securities representing any part of the debtor's estate unless and until full compensatory treatment is given for the entire bundle of rights which the senior creditors surrender. In the proceeding 26591-S, the Plan of Reorganization approved by this Court and by the Supreme Court of the United States allotted to the senior creditors, in full satisfaction of their claims, securities representing in the determination of the Interstate Commerce Commission and of the Court the full value of their claims without resorting to an excess value of the senior liens which they surrendered; and thereupon gave a residue valued at \$5,964,296 to creditors secured by liens wholly subordinate to the liens held by the senior creditors. It is accordingly *res adjudicata* in the proceeding 26591-S that any fiduciary duty of the plaintiffs Western Pacific Railroad Corporation to donate its special tax credit, or taxes remitted there against, under Section 23(g)(2)(4) is one to be exercised for the exclusive benefit of the creditors of the debtor Western Pacific Railroad Company left unprovided for or inadequately provided for under the Plan of Reorganization approved by the Supreme Court of the United States in *Ecker vs. Western Pacific Railroad Corporation*, 318 U. S. 448.

Eighth: In the exercise of its jurisdiction in the proceedings 26591-S, the Interstate Commerce Commission determined the amount of the indebtedness of the debtor as of January 1, 1939, for which full compensatory treatment was not accorded under the

Plan of Reorganization to be \$13,914,530, of which \$6,249,750 was due and owing to the A. C. James Company; \$7,609,370 was due and owing to the plaintiff Western Pacific Railroad Corporation, and \$60,410 was due and owing to Western Realty Company. The claim of the A. C. James Company was liquidated in part out of collateral pledged by the debtor (junior lien bonds of the debtor or new securities issued thereagainst and substituted therefor) and the unliquidated balance as shown by an exhibit introduced by the defendant Railroad Company in said action "No. 26508 Civil" is \$3,495,000 but is subject to adjustment bringing it up to \$3,683,175.* In addition to the creditor claims so determined and allowed by the Interstate Commerce Commission the claim of plaintiff Western Pacific Railroad Corporation as owner of all of the debtor's preferred stock was allowed in the amount in excess of \$40,000,000.**

*In the exhibit introduced by the defendant Railroad Company to establish the deficiency of the A. C. James Company, it was charged with 37,635 shares of new common stock at \$62 instead of its true currency value of \$57 as fixed by the treatment accorded the senior lien creditors—exhibit (defendant's) No. 33, record page 2022.

**A secured claim of Railroad Credit Corporation was fully liquidated by the use of common stock pledged at \$62 per share and certain Accommodation Collateral supplied by Western Pacific Railroad Corporation, the unused balance of which Accommodation Collateral was restored to Western Pacific Railroad Corporation under a decree of the Chancery Court of the State of Maryland.

Ninth: As hereinbefore alleged the plaintiffs are filing this complaint as an independent or successor action in equity to provide an essential machinery or medium for implementing the decree or judgment in said action "No. 26508 Civil" and for an administration of the trust arising thereunder or in consequence thereof and as a civil action in equity between citizens of different states, viz., the plaintiffs Western Pacific Railroad Corporation and Alexis I. Du Pont Bayard, Receiver, both being citizens and residents of the State of Delaware and Western Pacific Railroad Company, a corporation, organized and existing under the laws of the State of California, as a defendant, wherein the amount in controversy greatly exceeds \$5,000.00.

Tenth: James Foundation of New York, Inc., successor to the creditor position of A. C. James Company, is a corporation of the State of New York; and Western Realty Company is a corporation of the State of Colorado, and each being an unsatisfied creditor of the debtor, and as such a beneficiary of the trust created as hereinbefore alleged, is an interested but not an indispensable party to this proceeding, and being such both also have been named as parties defendant herein.

Eleventh: The reason why this complaint was not filed at a earlier date is that the status of the \$17,-201,739 fund in the custody of the reorganized Western Pacific Railroad Company, defendant herein, was not finally established until the denial of the second petition for certiorari at the present

term of the United States Supreme Court in said action in this Court entitled, "Western Pacific Railroad Corporation, et al., vs. Western Pacific Rr. Co., et al., No. 26508-Civil."

Twelfth: While said second petition for certiorari was pending in the United States Supreme Court on application for rehearing, the plaintiff receiver wrote the President of the defendant Railroad Company as follows:

"If the Supreme Court denies our pending petition for a rehearing of the application for certiorari and establishes the position taken by your counsel throughout the litigation that the \$17,000,000 fund in your custody is a trust fund for the satisfaction of the unpaid creditors of your company (pre-reorganization) it is our purpose to apply to the Bankruptcy Court for a proper application of the fund to that purpose. I am writing this in advance to put you and your directors on notice of our position."

No reply to or acknowledgment of said communication has been received by the plaintiffs but they are informed and allege that the defendant Railroad Company proposes to divert the fund to purposes other than the payment and satisfaction of claims of partially paid and wholly unpaid (pre-reorganization) creditors of the defendant Railroad Company and to utilize it for the enrichment of the creditors, and successors in interest of creditors that received full compensatory treatment under the Plan of Reorganization.

Wherefore, the plaintiffs pray:

(1) That this Court make cognizance of this cause and grant unto them a writ of subpoena of the United States directed to Western Pacific Railroad Company, James Foundation of New York, Inc., and Western Realty Company, named as defendants herein, service upon the two defendants last named to be made by the Marshal of the District wherein personal service may be effected;

(2) That this Court grant unto the plaintiff a judgment or decretal order adjudging that the fund of \$17,201,739 in the possession of the reorganized Western Pacific Railroad Company is held by it subject to the Assumption Agreement executed by it pursuant to the order and decree of this Court in the proceeding 26591-S* in the order of their respective priorities and for the interests junior thereto as heretofore determined by the Interstate Commerce Commission;

(3) That this Court enter a preliminary order placing said fund of \$17,201,739 in judicial custody and requiring and directing the defendant Western Pacific Railroad Company to hold said fund subject to the further order or orders of this Court which may include an order or orders providing therefrom currently for the expenses of the plaintiffs and their attorney and counsel in resisting the threatened conversion thereof; and

*[and is held by it in trust for the benefit of the unpaid and unsatisfied creditors of the debtor in said proceedings 26591-S.] (Interlineated April 29, 1954.)

(4) That the plaintiffs may have such further relief by way of declaratory judgment or decree of injunction, temporary or permanent, or both, or otherwise as to the Court may seem meet.

Dated April 21, 1954.

WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I. DU PONT BAYARD,
RECEIVER,

Plaintiffs;

By LEROY R. GOODRICH,
Their Attorney.

FRANK C. NICODEMUS, JR.,
WILLIAM MARVEL,
Counsel.

[Endorsed]: Filed May 13, 1954.

[Title of District Court and Cause.]

PETITIONER'S POINTS AND AUTHORITIES
IN SUPPORT OF ITS PETITION FOR AN
ORDER TO SHOW CAUSE

I.

A violation of the injunctive provisions of the Final Order of this Court in the above-entitled proceeding by filing suit against petitioner on a claim that was released and discharged is punishable as a contempt of court.

(Order of Judge St. Sure in these proceedings dated March 19, 1947, holding The Western Pacific Railroad Corporation to be in contempt, copy of which is attached hereto as Exhibit I.)

In re Mustin (1908),
165 Fed. 506.

In re Bunnell (1937),
19 F. Supp. 861.

See also:

United States v. United Mineworkers (1947),
330 U. S. 258 (John L. Lewis contempt case).

II.

It was the purpose of the above-entitled reorganization proceeding to put at rest claims against the debtor and the reorganized company such as the plaintiffs in said action # 33514 now seek to assert.

Western Pacific R. Corp. v. Western Pacific
R. Co. (1949), 85 F. Supp. 868, 874, 875:

“* * * the philosophy underlying Section 77 of the Bankruptcy Act stands as a barrier against the equitable validity of plaintiff's claim in this cause. Rehabilitation of a debtor by readjusting its financial structure in the interest of the debtor, its creditors and the public, in a fair and equitable plan of reorganization, is the essential purpose of Section 77. If a debtor in fact has an equity, it is and should be recognized. If not, it is disregarded. Above all, Section 77 was devised to provide in the public in-

terest both a speedy and efficient means of resuscitating, among others, sick and ailing railroads.

“(Citations.)

“When it was finally determined, after running the full gamut of court and administrative procedure, in the reorganization of the Western Pacific Railroad Company, that the plaintiff’s interest was worthless, nothing short of some extraordinary cause justifying reopening the reorganization proceeding could effect a change. To make any award in this cause, under the assumed authority of equity principles, would be in effect to modify the administrative and judicial judgments in the reorganization proceeding. Such a procedure would be an indirect nullification of the purpose of the reorganization statute, in the guise of an afterthought allegedly of equitable persuasion.”

Respectfully submitted,

/s/ ALLAN P. MATTHEW,

/s/ JAMES D. ADAMS,

/s/ BURNHAM ENERSEN,

/s/ ROBERT L. LIPMAN,

Attorneys for The Western Pacific Railroad Company.

McCUTCHEN, THOMAS, MATTHEW, GRIF-
FITHS & GREENE,

Of Counsel.

EXHIBIT No. 1

In the District Court of the United States, for the
Northern District of California, Southern Division

No. 26591-S

In the Matter of:

THE WESTERN PACIFIC RAILROAD COMPANY,

Debtor.

ORDER ADJUDGING THE WESTERN
PACIFIC RAILROAD CORPORATION
GUILTY OF CONTEMPT OF THE FINAL
ORDER OF THIS COURT HEREIN

The petition of The Western Pacific Railroad Company, the Debtor herein, now discharged, for an order adjudging The Western Pacific Railroad Corporation guilty of contempt of the Final Order of this Court dated March 28, 1946, in the above-entitled proceeding, came on regularly for hearing and was heard by the Court on June 11, 1954, pursuant to the Order to Show Cause issued thereon, and briefs having been filed as permitted by the Court, the matter has been submitted to the Court for decision.

The Court, being fully advised, finds:

(a) That The Western Pacific Railroad Corporation is a corporation created and existing under the laws of the State of Delaware, and is a party to the above-entitled reorganization proceeding.

(b) That a copy of the Final Order of this Court made and filed herein on March 28, 1946, was duly served on The Western Pacific Railroad Corporation within thirty days after March 28, 1946.

(c) That no appeal was taken from said Final Order, that the time for appeal therefrom has expired, and that said Final Order has become final and is now in full force and effect.

(d) That on August 24, 1946, said The Western Pacific Railroad Corporation commenced in this Court an action against the petitioner and others numbered 26333-H and entitled "The Western Pacific Railroad Corporation, Plaintiff, vs. Sacramento Northern Railway, The Western Pacific Railroad Company and American Trust Company of San Francisco, as Trustee under an Indenture executed by Sacramento Northern Railroad as of July 1, 1918, Defendants"; and that on August 27, 1946, the petitioner was served with the summons and a copy of the bill of complaint in said action, a copy of which bill of complaint is attached to and incorporated in said petition.

(e) That said action No. 26333-H is still pending in this Court.

(f) That in and by said action The Western Pacific Railroad Corporation has asserted and now asserts a claim against the petitioner which, if it exists at all, existed on and before December 28, 1944, and was released and discharged by said Final Order; that the assertion of such a claim was and is barred and enjoined by said Final Order; and that the commencement of said action is not

and has not been provided for or permitted by any order of this Court.

(g) That in commencing and in maintaining said action against the Western Pacific Railroad Company, The Western Pacific Railroad Corporation has violated and continues to violate said Final Order of this Court in this proceeding.

The Court further finds and concludes that The Western Pacific Railroad Corporation is guilty of contempt of said Final Order of this Court in commencing and maintaining said action No. 26333-H against The Western Pacific Railroad Company.

Now, Therefore, It is Hereby Ordered, Adjudged and Decreed:

1. That The Western Pacific Railroad Corporation is in contempt of this Court.

2. That The Western Pacific Railroad Corporation shall pay to The Western Pacific Railroad Company the full amount of all costs, counsel fees and damages paid, incurred or suffered by The Western Pacific Railroad Company by reason of or on account of the commencing and maintaining of said action No. 33514 against it, which amount shall be determined by this Court upon application therefor by The Western Pacific Railroad Company and after a hearing upon such application not less than five days after notice to and service of a copy of such application upon counsel for The Western Pacific Railroad Corporation.

3. That The Western Pacific Railroad Corpora-

tion may purge itself of such contempt by dismissing its said action No. 26333-H as to The Western Pacific Railroad Company within the period of fifteen (15) days following service of a copy of this order upon counsel for The Western Pacific Railroad Corporation, and in case it shall so dismiss said action within said fifteen-day period The Western Pacific Railroad Corporation shall be released from its obligation to make payment to The Western Pacific Railroad Company as provided in the preceding paragraph of this order.

Dated: March 19, 1947.

A. F. ST. SURE,
Judge.

[Endorsed]: Filed May 13, 1954.

[Title of District Court and Cause.]

ORDER TO THE WESTERN PACIFIC RAILROAD CORPORATION AND ALEXIS I. DU PONT BAYARD, ITS RECEIVER, TO SHOW CAUSE WHY THEY SHOULD NOT BE ADJUDGED GUILTY OF CONTEMPT

It appearing by the verified petition of The Western Pacific Railroad Company, formerly the debtor and in due course discharged in the above-entitled proceeding, that The Western Pacific Railroad Corporation and Alexis I. DuPont Bayard, its receiver, have commenced an action in the District Court of the United States, for the Northern District of

California, Southern Division (No. 33514), which asserts a claim against the said The Western Pacific Railroad Company in violation of this Court's Final Order in this proceeding dated March 28, 1946; and the Court being fully advised, it is hereby

Ordered, that The Western Pacific Railroad Corporation and Alexis I. DuPont Bayard, its receiver, show cause before this Court in the courtroom of the undersigned judge of said Court, in the United States Post Office and Court House Building, in the City and County of San Francisco, State of California, on the 11th day of June, 1954, at 10 o'clock a.m., why they should not be adjudged guilty of and punished for contempt of this Court for violation of the said Final Order dated March 28, 1946 and why this Court should not grant petitioner such other and further relief, including its costs and damages, as may be proper in the premises.

Service of this order, together with a copy of the petition upon which it was granted, on or before May 28th, 1954, shall be sufficient service thereof.

Dated: May 13th, 1954.

/s/ LOUIS E. GOODMAN,

United States District Judge.

[Endorsed]: Filed May 13, 1954.

[Title of District Court and Cause.]

THE RESPONDENTS' RETURN TO THE
ORDER TO SHOW CAUSE WHY THEY
SHOULD NOT BE ADJUDGED GUILTY
OF AND PUNISHED FOR CONTEMPT OF
THIS COURT

Now come the respondents plaintiff in Civil Action No. 33514 and as their Return to the Order to Show Cause why they should not be adjudged guilty of and punished for contempt of this Court for violation of the final Order of this Court, dated March 28, 1946, respectfully show:

First: The successoral action commenced by the respondents in this Court, being Civil Action No. 33514, was brought against the defendant Western Pacific Railroad Company under the Assumption Agreement executed by the defendant Western Pacific Railroad Company as required by said final Order to enforce a valid and subsisting liability of the reorganization Trustees which was transferred to the reorganized Western Pacific Railroad Company; and it is an excepted action provided for and contemplated by said final decree of March 28, 1948, and in no respects violative thereof.

Second: Said successoral action was brought by respondents to implement a determination of the Court of Appeals in the Ninth Circuit in an earlier and substantially identical action brought by them under said Assumption Agreement, by providing a machinery or medium for the administration of a

trust resulting therefrom in respect of a fund of \$17,201,739.00 in the custody of the defendant Railroad Company but held by it subject to all of its obligations under said Assumption Agreement.

Third: Said successoral action was brought by the respondents under authority and at the direction of the Chancery Court of the State of Delaware, County of New Castle, as appears from the Affidavit of William Marvel, Attorney for the Receiver, filed herewith as part of this Return.

And having thus fully answered, and with profound respect, made their return to the Order, and adequate cause being shown, the respondents respectfully pray that the Order to Show Cause be dissolved.

Dated: May 28, 1954.

WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I. DU PONT BAYARD,
RECEIVER,

Plaintiffs;

By /s/ LEROY R. GOODRICH,
Their Attorney.

/s/ FRANK C. NICODEMUS, JR.,

/s/ WILLIAM MARVEL,
Counsel.

[Title of District Court and Cause.]

AFFIDAVIT OF WILLIAM MARVEL, AT-
TORNEY FOR ALEXIS I. DU PONT BAY-
ARD, RECEIVER

State of Delaware,
New Castle County—ss.

Be It Remembered that on this 26th day of May, 1954, personally came before me, the subscriber, a Notary Public for the State and County aforesaid, William Marvel, Attorney for Alexis I duPont Bayard, Receiver, who, being by me first duly sworn, did depose and say:

That by order of April 19, 1950, he was appointed attorney of record for the said Receiver by the Honorable Collins J. Seitz, Chancellor of the State of Delaware.

1. That Western Pacific Railroad Corporation is in process of liquidation in the Court of Chancery of the State of Delaware, in and for New Castle County, and Alexis I. duPont Bayard is its Receiver; and that he is informed that it is one of the three unpaid pre-organization creditors of Western Pacific Railroad Company.

2. That the action in the District Court for the Northern District of California, Southern Division, designated as Civil Action No. 33514, was commenced under the general authority and direction of the Chancellor of the State of Delaware, by Western Pacific Railroad Corporation and Alexis

I. duPont Bayard, its Receiver, against the reorganized Western Pacific Railroad Company, as the principal defendant, and James Foundation of New York and Western Realty Company, the two remaining unsatisfied pre-organization creditors, as secondary defendants for the following reasons:

(a) That the final orders and decrees of the Bankruptcy Court in No. 26591-S required the defendant Western Pacific Railroad Company to execute an assumption agreement whereby it assumes all liabilities of the Trustees growing out of their operations as such Trustees in a period which included January 1, 1942; April 30, 1944, and excepted from the inhibitions in the final orders and decrees against further litigation any suit brought under the assumption agreement to enforce a liability of the Trustees growing out of such operation;

(b) That the stock-loss tax credit in the use of which by the Trustees a tax liability of the Trustees for said period amounting to \$17,201,739 was relinquished by the Treasurer of the United States was the exclusive property of Western Pacific Railroad Corporation and was never an asset of the Western Pacific Railroad Company;

(c) That Western Pacific Railroad Corporation on October 10, 1946, in accordance with the authorization of the final orders and decrees in the Bankruptcy Court brought suit under the assumption agreement in the same District Court, being Civil Action No. 26508 against the reorganized Western Pacific Railroad Company, to require it to account to the plaintiff as the exclusive owner of said tax

credit for the amount of taxes relinquished there-against by the Treasurer of the United States;

(d) That accountability to Western Pacific Railroad Corporation as owner of the tax credit was denied and its expropriation by the Trustees was finally sanctioned by the Court of Appeals, in the Ninth Circuit, for the reason, as determined by that Court, that Western Pacific Railroad Corporation, as owner of all preferred and common stock of the pre-reorganization Western Pacific Railroad Company, owed a fiduciary duty and obligation to utilize its tax credit for the benefit of the creditors of the pre-reorganization Railroad Company.

3. That it was and is his opinion communicated to Alexis I. duPont Bayard, Receiver, that there is a justiciable question whether the defendant, Western Pacific Railroad Company, under the assumption agreement as successor to the obligations of the Trustees is not as a consequence of the opinion of the United States Court of Appeals in the Ninth Circuit accountable to such creditors to the same extent that it would have been accountable to the Western Pacific Railroad Corporation if the superior equity of the unsatisfied creditors had not supervened.

4. That it was and is his opinion, also communicated to Alexis I. duPont Bayard, Receiver, that the right of the Western Pacific Railroad Corporation and its said Receiver, as an unsatisfied creditor to require the Trustees to recognize their superior equity and to enforce that right under the assump-

tion agreement against the defendant Western Pacific Railroad Company is in principle the same as the right asserted under the assumption agreement in *Western Pacific Railroad Corporation, et al., vs. Western Pacific Railroad Company, et al., No. 26508*, which was not questioned by the Court of Appeals or the United States Supreme Court as being affected by the injunctive provisions of the decree of the Bankruptcy Court entered on March 28, 1946.

/s/ WILLIAM MARVEL.

Sworn to and subscribed before me the day and year aforesaid. Witness my hand and seal of office.

[Seal] /s/ FLORENCE P. BAGLEY,
Notary Public.

[Endorsed]: Filed June 1, 1954.

[Title of District Court and Cause.]

ACKNOWLEDGMENT OF SERVICE

Service of the paper hereinafter described is acknowledged by the undersigned this 1st day of June, 1954.

Return of Western Pacific Railroad Corporation as respondent to Order to Show Cause why it should not be adjudged guilty of contempt, made May 13, 1954, by the Honorable Louis E. Goodman, United States District Judge, together with Affidavit of

William Marvel, Attorney for Alexis I. Du Pont Bayard, Receiver.

ALLAN P. MATTHEW,
JAMES D. ADAMS,
BURNHAM ENERSEN,
ROBERT L. LIPMAN,

By /s/ JAMES D. ADAMS.

[Endorsed]: Filed June 1, 1954.

In the United States District Court, for the Northern District of California, Southern Division
No. 26591

In the Matter of:

THE WESTERN PACIFIC RAILROAD COMPANY,

Debtor.

ORDER ADJUDGING THE WESTERN PACIFIC RAILROAD CORPORATION AND ALEXIS I. DU PONT BAYARD, RECEIVER, GUILTY OF CONTEMPT

The petition of The Western Pacific Railroad Company, the Debtor herein, now discharged, for an order adjudging The Western Pacific Railroad Corporation and Alexis I. Du Pont Bayard, Receiver guilty of contempt of the Final Order of this Court dated March 28, 1946, in the above-entitled proceeding, came on regularly for hearing and was heard by the Court on June 17, 1954, pursuant to the Order to Show Cause issued thereon, and briefs having been filed as permitted by the Court, the matter has been submitted to the Court for decision.

The Court finds that each and all of the allegations of the petition are true and correct.

The Court finds that The Western Pacific Railroad Corporation and Alexis I. Du Pont Bayard, receiver, are guilty of contempt of the final order of this Court in commencing and maintaining Action # 33514 against The Western Pacific Railroad Company.

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed:

1. That The Western Pacific Railroad Corporation and Alexis I. Du Pont Bayard, Receiver, are, and each of them is, in contempt of this Court.

2. That The Western Pacific Railroad Corporation and the said Receiver shall pay to The Western Pacific Railroad Company the full amount of all costs, counsel fees and damages paid, incurred or suffered by The Western Pacific Railroad Company by reason of or on account of the commencing and maintaining of said action No. 33514 against it, which amount shall be determined by this Court upon application therefor by The Western Pacific Railroad Company and after a hearing upon such application not less than five days after notice to and service of a copy of such application upon counsel for The Western Pacific Railroad Corporation.

Dated: June 28, 1954.

/s/ LOUIS E. GOODMAN,

United States District Judge.

[Endorsed]: Filed June 28, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Western Pacific Railroad Corporation and Alexis I. Du Pont Bayard, Receiver, respondents under an order to show cause, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the order made and entered June 28, 1954, by the Honorable Louis E. Goodman, United States District Judge, upon the motion of the Western Pacific Railroad Company, granting said motion and finding that said respondents are guilty of contempt of said District Court in commencing and maintaining an Action No. 33514 in said District Court against the Western Pacific Railroad Company.

Dated: July 26, 1954.

WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I. DU PONT BAYARD,
Receiver,

Plaintiffs;

By /s/ LEROY R. GOODRICH,
Their Attorney.

/s/ FRANK C. NICODEMUS, JR.,

/s/ WILLIAM MARVEL,
Counsel.

[Endorsed]: Filed July 28, 1954.

[Title of District Court and Cause.]

BOND ON APPEAL FOR COSTS

Know All Men by These Presents:

That Western Pacific Railroad Corporation and Alexis I. DuPont Bayard, Receiver, as Principals, and United States Fidelity and Guaranty Company, a corporation organized and existing under and by virtue of the laws of the State of Maryland, and authorized to transact its business of suretyship in the State of California, as Surety, are held and firmly bound unto the above-named Debtor, The Western Pacific Railroad Company, in the full and just sum of Two Hundred Fifty and 00/100 (\$250.00) Dollars, lawful money of the United States of America, to be paid to the said above-named Debtor, its successors or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 27th day of July, 1954,

The Condition of the Above Obligation is such, That

Whereas, on the 28th day of June, 1954, upon the petition of the Western Pacific Railroad Company, the Debtor herein, for an Order adjudging the Western Pacific Railroad Corporation and Alexis I. DuPont Bayard, Receiver, guilty of contempt of the final Order of this Court dated March 28, 1946.

by reason of the filing and maintaining of Action No. 33514 against the Western Pacific Railroad Company, and

Whereas, on June 28, 1954, such Order adjudging said Respondents in contempt was made and said Respondents have appealed to the United States Court of Appeals for the Ninth Circuit.

Now, Therefore, if the said Respondents shall pay the costs if said appeal is dismissed or the judgment affirmed, or such costs as the Appellate Court may award if the Order is modified, then the above obligation to be void; otherwise to remain in full force and effect.

/s/ LEROY R. GOODRICH,
Attorney for Respondents.

UNITED STATES FIDELITY AND GUAR-
ANTY COMPANY,

By /s/ MILDRED DROST,
Attorney-in-Fact.

Aug. 11, 1954.

State of California,
County of Alameda—ss.

On July 27, 1954, before me, Boyd A. Gibson, a Notary Public in and for the County of Alameda, personally appeared Mildred Drost, known to me to be the person whose name is subscribed to the within instrument as the Attorney-in-fact of the United States Fidelity and Guaranty Company, and acknowledged to me that he subscribed the name of

the United States Fidelity and Guaranty Company thereto as principal and his own name as Attorney-in-fact.

[Seal] /s/ BOYD A. GIBSON,
Notary Public in and for the County of Alameda,
State of California.

Aug. 11, 1954.

[Endorsed]: Filed July 28, 1954.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO
RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing documents, listed below, are the originals filed in this Court in the above-entitled case and that they constitute the record on appeal herein as designated by the attorneys for the appellants:

Petition of the Western Pacific Railroad Company for an order to show cause with Exhibit A attached.

Petitioner's points and authorities in support of its petition for an order to show cause.

Order to the Western Pacific Railroad Corporation and Alexis I. Du Pont Bayard, its receiver, to show cause why they should not be adjudged guilty of contempt.

The Respondent's return to the order to show cause why they should not be adjudged guilty of and punished for contempt of this court.

Acknowledgment of Service.

Order adjudging the Western Pacific Railroad Corporation and Alexis I. Du Pont Bayard, Receiver, guilty of contempt.

Notice of Appeal.

Cost bond on appeal.

Designation of record on appeal.

In Witness Whereof, I have hereunto set my hand and affixed the seal of this District Court, this 3rd day of September, 1954.

[Seal] C. W. CALBREATH,
Clerk;

By /s/ WM. C. ROBB,
Deputy Clerk.

[Endorsed]: No. 14,501. United States Court of Appeals for the Ninth Circuit. Western Pacific Railroad Corporation and Alexis I. Du Pont Bayard, Appellants, vs. Western Pacific Railroad Company, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed September 3, 1954.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14501

IN RE WESTERN PACIFIC RAILROAD COM-
PANY,

Debtor,

THE WESTERN PACIFIC RAILROAD COR-
PORATION and ALEXIS I. DU PONT
BAYARD, Receiver,

Appellants,

THE WESTERN PACIFIC RAILROAD COM-
PANY,

Appellee.

STATEMENT OF POINTS ON WHICH THE
WESTERN PACIFIC RAILROAD COR-
PORATION AND ALEXIS I. DU PONT
BAYARD, ITS RECEIVER, WILL RELY

The Western Pacific Railroad Corporation and Alexis I. du Pont Bayard, its receiver, have heretofore appealed to the United States Court of Appeals for the Ninth Circuit from the Order, made and filed on June 28, 1954, by the Honorable Louis E. Goodman, United States District Judge, adjudging The Western Pacific Railroad Corporation and Alexis I. du Pont Bayard, its receiver, guilty of contempt of the Final Order of the District Court, dated March 28, 1946, in the above-entitled proceeding, in commencing and maintaining Action No.

33514 against The Western Pacific Railroad Company.

Appellants hereby make the following statement of points upon which they will rely:

1. That the District Court was in error in making its order of June 28, 1954, adjudging the appellants guilty of contempt.

That the claim presented to the District Court in No. 33514 Civil is not the claim made by The Western Pacific Railroad Corporation in an action, No. 26508, decided by the District Court on September 6, 1949, and on appeal as No. 12506 in the United States Court of Appeals.

2. That the claim set forth in Action No. 33514 is filed by plaintiffs, not in the capacity of The Western Pacific Railroad Corporation as a taxpayer, or as the parent corporation of which The Western Pacific Railroad Company was a subsidiary, but in its capacity as an unpaid pre-reorganization creditor, and on behalf of itself and all other such creditors.

3. That the cause of action or liability, which it asserts, arises from the fact that, as has been held by the United States Court of Appeals in its judgment in No. 12506, The Western Pacific Railroad Corporation, as the parent corporation, was under a fiduciary duty to make the use of its losses and its tax credits and tax savings available to The Western Pacific Railroad Company in the interest of and for the benefit of its unpaid pre-reorganiza-

tion creditors; that all such creditors are named in the present action. That upon receipt thereof, The Western Pacific Railroad Company incurred a like fiduciary duty and obligation to the said creditors.

4. That the resulting fiduciary duty and obligation resting upon The Western Pacific Railroad Company did not arise until after the entry of the Final Order in Proceeding No. 26591, and that it is a duty or obligation covered by and included in the Assumption Agreement executed by The Western Pacific Railroad Company, and specifically assumed by said company.

/s/ LEROY R. GOODRICH,
Attorney for Appellants.

/s/ FRANK C. NICODEMUS, JR.,
/s/ WILLIAM MARVEL,
Counsel.

[Endorsed]: Filed September 7, 1954.